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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 669

NATHAN GOLLIN AND BENJAMIN RICHMAN,
Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FREDERIC M. P. PEARSE,
Counsel for Nathan Gollin;
HAROLD SIMANDL,
Counsel for Benjamin Richman.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 669

NATHAN GOLLIN AND BENJAMIN RICHMAN,
Petitioners, Appellants Below,
vs.

THE UNITED STATES OF AMERICA,
Respondent, Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent:

I

Summary Statement of Matter Involved

A. Petitioners were called to trial in the United States District Court for the District of New Jersey upon an indictment that contained two counts, the first count in

substance charging: that on or about June 15, 1946, at Newark, New Jersey, they did knowingly steal, take, and carry away from a certain automobile truck, in the custody and possession of P. Ballantine & Sons, 600 cases of bottled beer, which were moving as, and formed a part of and constituted an interstate shipment of freight in the course of shipment in interstate commerce; and the second count in substance charging: that they did on the same day at Keansburg, New Jersey, receive and have in their possession said beer, well knowing the same to be stolen, in violation of Title 18 U. S. C., Section 409 (R. 3).

B. Petitioners' contention requires a brief statement of the evidence. P. Ballantine & Sons' brewery occupies several blocks in the City of Newark (R. 15). The company uses the public streets adjoining its plant for loading and unloading its trucks and parking same. Shortly after midnight on Saturday, June 15, 1946, Theodore Barowsky, a Ballantine employee, whose duty it was to load and unload trucks, backed trailer truck No. 327 against the loading platform and loaded it with 600 cases of bottled beer (R. 9, 10). Another employee, the checker, checked the load, closed the door of the truck and sealed it (R. 11, 12). Barowsky signed the bill of lading—Ex. G-1 (R. 11, 79). It recited that the beer was consigned to Charles Luberger, North Tarrytown, New York (R. 11, 79). There was not enough room at the loading platform to allow the truck to remain there, so Barowsky put it to one side, by driving it around the corner and parking it in the street, in front of the Ballantine garage (R. 11, 16). He took the keys out of the truck and hung them in the garage and placed the signed bill of lading in the key ring (R. 12, 13, 16). It was company practice to post a schedule in the truck dispatcher's office whereon appeared the names of the drivers, the truck to which each was assigned, and the destination

of the truck and the type of merchandise that was in the load (R. 54). No schedule was produced at the trial. It was necessary for each of the drivers to report at the dispatcher's office where he received his assignment. The driver, if any, that had been assigned to the truck in question would have been required to report at the dispatcher's office and then go to the garage, obtain the truck keys and the bill of lading, and thereafter commence his journey (R. 16, 55). While Barowsky was loading another truck, he noticed that the truck in question was missing (R. 13, 14). He inquired at the garage as to whether or not it was being repaired, and was advised that it was not (R. 13). He found the keys and bill of lading in the garage exactly where he had placed them (R. 13, 17). He then notified his superiors (R. 13) and several hours later officers of the Newark Police Department found the truck on a street in the City of Newark, some distance from the brewery, empty (R. 19, 20). Some weeks later agents of the Federal Bureau of Investigation found the beer in two taverns at Keansburg, New Jersey (R. 48, 49, 60). Albert Siegel, proprietor of one of the taverns, testified that he had purchased the beer through the petitioner, Richman, and that Richman, in his presence, had divided the money paid for the beer with Gollin (R. 31, 32, 34).

Petitioners rested without offering any testimony and made motions for judgments of acquittal, upon the ground that the government had failed to prove that the beer in question was moving as, or formed a part of, or constituted an interstate shipment. The motions were denied by the Trial Court (R. 63, 64, 65).

The Trial Court instructed the jury—"that as a matter of law the truck was moving in interstate commerce at the time it is contended by the government that the beer was stolen therefrom. That is a matter of law. The facts are not disputed and that constitutes the jurisdiction of this

court and is a matter for the court to determine and not a matter for the jury to determine" (R. 71, 72). Petitioners were found guilty on both counts of the indictment and each sentenced to two years on the first count and one year on the second count to run consecutively (R. 2).

Petitioners appealed to the Circuit Court of Appeals for the Third Circuit, upon the grounds: (1) That the Trial Court erred in denying the several motions for judgments of acquittal; (2) That the Trial Court erred in the instruction above mentioned; (3) That the Trial Court erred in refusing to charge their request No. 2 (R. 78, 75).

The Circuit Court of Appeals held that the Trial Court had erred in its instructions to the jury and remanded the cause to the District Court for a new trial. However, it sustained the Trial Court in refusing to grant petitioners' motions for judgments of acquittal, and it is to this portion of the judgment of the Circuit Court of Appeals that this petition is addressed.

II

Jurisdictional Statement

An appeal was taken to the Circuit Court of Appeals for the Third Circuit, which on February 11, 1948 reversed the judgments of the District Court for the District of New Jersey, and remanded the case to that Court for a new trial, instead of reversing the judgments and remanding the cause for entry of judgments of acquittal and the discharge of petitioners. The opinion of the Court below has not yet been reported, but appears shortly following Record Page 87.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 347(a); Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; and Rule 37(b) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

III

Questions Presented

The questions presented are:

(1) Where persons are charged with stealing merchandise that was moving as, formed a part of, and constituted an interstate shipment and also with receiving same in violation of Title 18 U. S. C. 409, is the jurisdiction of the Federal Court established by proof that the merchandise was loaded by the seller, as shipper, upon its own truck, a bill of lading prepared, and the loaded truck put to one side to await the arrival of the shipper's employee, who, at some later time was to drive it to another State; and before the arrival of such driver, the loaded truck was stolen?

(2) Where persons are tried upon an indictment charging them with stealing merchandise that was moving as, formed a part of, and constituted an interstate shipment and also with receiving same in violation of Title 18 U. S. C. 409, is the Trial Court justified in denying motions for judgments of acquittal and the Circuit Court of Appeals justified in sustaining such action, where the proof is that the merchandise was loaded by the seller, as shipper, upon its own truck, a bill of lading prepared and the loaded truck put to one side to await the arrival of the shipper's employee, who at some later time was to drive it to another state; and before the arrival of such driver, the loaded truck was stolen?

IV

Reasons for Allowance of the Writ

The Circuit Court of Appeals erroneously decided that the theft of the beer in question took place while it was moving as, formed a part of, and constituted an interstate shipment. The Court's decision is based primarily upon the concept that interstate movement began when the loader,

for convenience, put the loaded truck to one side to await the arrival of the driver who was to take it upon its interstate journey. The Court implied that it would have ruled otherwise, if the loaded truck had been permitted to remain at the loading platform to await the driver's arrival. However, whether the truck, when stolen, was actually at the loading platform or parked in front of the company's garage made no difference, for in either event, it was, for all practical purposes, upon the shipper's premises; the place where the merchandise was produced, and the shipper contemplated that the driver would not start the loaded truck upon its interstate journey until he had reported at the dispatcher's office and received his instructions so to do. Then and only then would the driver be authorized to obtain the keys and bill of lading from the company garage, take possession of the truck and start it upon its interstate journey, but until the driver had actually taken possession of the truck, the shipper was free to do whatever it pleased with the shipment or the truck.

The ruling of the Court below is in direct conflict with the decisions of this Court in *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Coe* v. *Errol*, 116 U. S. 417, wherein it is decided that interstate commerce does not commence until the commodities have actually entered upon their final journey to another state. But, in *United States* v. *Fox* (C. C. A. 2), 126 F. (2d) 237, the Court seems to question whether this Court's decision in *Coe* v. *Errol, supra*, governs in determining when interstate commerce commences under the criminal statute herein involved. The question of when interstate commerce commences under the statute (18 U. S. C. 409) has not been decided by this Court. It is a question which arises frequently, and is of large public importance, and therefore should be decided by this Court.

The ruling of the Court below is also in direct conflict with the decision of the Circuit Court of Appeals for the

8th Circuit in *Wolk* v. *United States*, 98 F. (2d) 310, 317; that of the 2nd Circuit in *United States* v. *Fox*, 126 F. (2d) 237 and also the decision of the 5th Circuit, in *Sharp* v. *United States*, 281 F. 86, 88. In each of those cases, the Court considered the statute herein involved and decided that interstate commerce began only after the goods had left the premises and possession of the shipper and were actually in the hands of those whose task it was, to deliver them to their destination in the other state.

WHEREFORE, your petitioners pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court for its review and determination on a day certain to be therein designated, a full and complete transcript of the record and of all the proceedings of the said Circuit Court of Appeals in the said cases entitled in that court: *United States of America* v. *Nathan Gollin*, No. 9405, October Term, 1946 and *United States of America* v. *Benjamin Richman*, No. 9410, October Term, 1946, to the end that said cases may be reviewed and determined by this Court as provided for by the statutes of the United States and that the judgments herein of the Circuit Court of Appeals be reversed by this Honorable Court, and for such other further relief as to this Court may seem proper.

NATHAN GOLLIN,
By FREDERIC M. P. PEARSE,
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BENJAMIN RICHMAN,
By HAROLD SIMANDL,
Attorney for and of Counsel With
Petitioner, Benjamin Richman.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 669

NATHAN GOLLIN AND BENJAMIN RICHMAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 89–96) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered February 11, 1948 (R. 97). The petition for a writ of certiorari was filed March 11, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether, on the undisputed evidence, the trial court should have ruled as a matter of law that the goods which petitioners were charged with having stolen and received were not "goods or chattels moving as or which are a part of or which constitute an interstate * * * shipment of freight or express," within the purview of 18 U. S. C. 409.

STATUTE INVOLVED

The Act of February 13, 1913, c. 50, 37 Stat. 670, as amended, 43 Stat. 793, 47 Stat. 773 (18 U. S. C. 409), provided in pertinent part at the time of the offenses in question here:

> Whoever * * * shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, wagon, automobile, truck, or other vehicles, * * * with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, or shall buy or receive or have in his possession any such goods or chattels, knowing the same to have been stolen * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *. The words "station house," "platform," "depot," "wagon," "automobile," "truck," or "other vehicle," as used in this section, shall include any station house, platform,

depot, wagon, automobile, truck, or other vehicle of any person, firm, association, or corporation having in his or its custody therein or thereon any freight, express, goods, chattels, shipments, or baggage moving as or which are a part of or which constitute an interstate or foreign shipment.

STATEMENT

An indictment in two counts was returned against petitioners in the District Court for the District of New Jersey charging violations of 18 U. S. C. 409 (R. 3–5). The first count charged the theft of 600 cases of beer which "were moving as, formed a part of and constituted an interstate shipment of freight, in the course of shipment in interstate commerce." The second count charged petitioners with receiving and having the beer in their possession, knowing it to have been stolen.

So far as here relevant, the undisputed evidence presented by the Government showed the following facts:

About 1:00 A. M. on June 15, 1946 (R. 9, 15), 600 cases of beer were loaded on a truck belonging to P. Ballantine & Sons, a brewery (R. 50), at the loading platform on the company's premises in Newark, New Jersey (R. 10). After the truck was loaded, its door was closed and sealed (R. 11). Previously, a bill of lading had been prepared covering this prepaid shipment from Ballantine to Charles Luberger at North Tarrytown, New York (R. 11, 79), and in accordance with Ballan-

tine's usual practice, drivers had been assigned to make this particular trip (R. 54). After the truck was loaded and sealed, the witness Borowsky, one of Ballantine's employees, drove it from the loading platform to a street two blocks away, where he parked it opposite the company's garage (R. 12). He then took the bill of lading and the key for the truck into the garage and hung them on a nail there (R. 12), to be picked up later by the drivers assigned to make the trip (R. 16).

About 2:00 o'clock the same morning (R. 14), Borowsky observed that the truck had disappeared from the place where he had parked it and that the key and bill of lading were still in the garage where he had left them (R. 13). The truck was recovered by the Newark police at 4:20 a. m. the same day; the seal was broken, the doors open, and the truck empty (R. 21).

At the close of the Government's case, petitioners moved for directed verdicts of acquittal for insufficiency of the evidence; the motions were denied (R. 63–64). The court charged the jury that, as a matter of law, on the undisputed evidence adduced, the beer was in interstate commerce at the time of the theft (R. 71–72). The jury returned verdicts of guilty against both petitioners on each count (R. 76). Thereafter, petitioners renewed their motion for a judgment of acquittal, one of the grounds of the motion being (R. 83–84):

> That the Court is without jurisdiction in this case, the Government having failed to prove that the goods referred to in the indictment * * * were moving in interstate commerce at the time the alleged offenses occurred.

This motion was also denied (R. 2).

Each of the petitioners was sentenced to imprisonment for two years on the first count and one year on the second, to run consecutively (see R. 2, 85–87).

On appeal, the circuit court of appeals held that it was error for the trial court to instruct the jury that, as a matter of law, the beer was in interstate commerce at the time of the theft, since it was within the province of the jury to pass on the credibility of the witnesses and they might have disbelieved the uncontradicted testimony as to the loading and movement of the truck (R. 92–96). Accordingly, the judgments were reversed and the cause remanded for a new trial (R. 97). However, the circuit court of appeals upheld the district court's action in denying petitioners' motions for judgments of acquittal, holding that the evidence, if believed, established that the beer was in interstate commerce when it was stolen (R. 92, 93). It is this action which petitioners seek to have reviewed by this Court.

ARGUMENT

We submit that under well established precedents, the undisputed evidence in this case estab-

lishes that the beer was in interstate commerce at the time of the theft. The court below has cogently set forth the controlling considerations and authorities (R. 90–92). In effect, what happened here was that P. Ballantine & Sons transferred the goods from itself as shipper to itself as interstate carrier under a through bill of lading. The transfer was completed, at the latest, upon the sealing of the truck, with the bill of lading prepared and all arrangements completed for the physical transportation. Had the truck belonged to an independent carrier, either an interstate carrier (see *United States* v. *De Normand,* 149 F. 2d 622, 624 (C. C. A. 2), certiorari denied, 326 U. S. 756), or an intrastate transfer company (*United States* v. *Fox,* 126 F. 2d 237 (C. C. A. 2)), there could be no possible question that the interstate shipment had commenced. And it is equally clear from the definitions contained in the last sentence of the statute quoted above (pp. 2–3) that the result is not affected by the fact that the carriage is by the owner of the property. *Friedman* v. *United States,* 233 Fed. 429 (C. C. A. 1), certiorari denied, 244 U. S. 657; *Marifian* v. *United States,* 82 F. 2d 628, 630 (C. C. A. 8), certiorari denied, 298 U. S. 686. The shipment having commenced, the fact that it was somewhat delayed thereafter did not remove it from interstate commerce. *Hughes Bros. Co.* v. *Minnesota,* 272

U. S. 469; *United States* v. *Sheffield Farms Co.*, 43 F. Supp. 1, 5 (S. D. N. Y.).

Apart from the fact that *Hammer* v. *Dagenhart*, 247 U. S. 251, upon which petitioner relies (Pet. 6), has been overruled (*United States* v. *Darby*, 312 U. S. 100, 115–117), that case involved no question as to the point when interstate commerce commences. *Coe* v. *Errol*, 116 U. S. 517 (see Pet. 6), is also inapposite; it involved only a question of the validity of a state tax imposed upon property intended for export to another state and partially prepared for that purpose (Pet. 6). In the present case the beer had been "actually started in the course of transportation to another State, or delivered to a carrier for such transportation" (116 U. S. at 525).

Nor, clearly, is the decision below on this point in conflict with *Wolk* v. *United States*, 94 F. 2d 310 (C. C. A. 8), *United States* v. *Fox*, *supra*, or *Sharp* v. *United States*, 280 Fed. 86 (C. C. A. 5), as petitioner contends (Pet. 6–7). In the *Wolk* case it was held that goods had been started on their interstate shipment at least when they were delivered on a through bill of lading to a local, intrastate shipper for transfer to an interstate carrier. Similarly in the *Fox* case, the court held that interstate shipment begins "at least as soon as the goods have finally left the shipper's possession and have come into the possession of any of those who are to forward

them upon an interstate journey, intended to be such from the outset" (126 F. 2d at 238). The *Sharp* case is to similar effect. Petitioners' statement (Pet. 7) that under these cases "interstate commerce began *only* after the goods had left the premises and possession of the shipper" (italics supplied) is clearly erroneous. To adopt this view would remove from the scope of the statute all cases in which the stolen property belongs to the carrier. But, as noted above, this contention has been rejected by the courts. *Friedman* v. *United States, Marifian* v. *United States, supra.*

CONCLUSION

The decision of the court below on the issue here raised is clearly correct. The petition for a writ of certiorari presents no question requiring further review by this Court. We therefore respectfully submit that it should be denied.

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